IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

FREE THE NIPPLE – SPRINGFIELD RESIDENTS PROMOTING EQUALITY, JESSICA LAWSON, and AMBER HUTCHISON,	)	
Plaintiffs,	)	Case No. 6:15CV3467
v.	)	
CITY OF SPRINGFIELD, MISSOURI,	)	
Defendant.	)	

SUGGESTIONS IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

In August 2015, Plaintiffs Free the Nipple – Springfield Residents Promoting Equality, an unincorporated association, Jessica Lawson, and Amber Hutchison, residents of Missouri (collectively, "Plaintiffs"), organized rallies in Springfield's public square. At the protests, which took place August 7 and August 23, 2015, men and women engaged in expressive conduct to convey a particularized message: promoting gender equality, protesting women's inferior legal status, and denouncing the double standard underlying government censorship of female breasts. Lawson, Hutchison, and other female rally participants complied with what was then the Springfield "indecent exposure" law by covering their nipples with opaque tape but otherwise exposing the tops of their bodies. Male participants also exposed the tops of their bodies but also taped their nipples, though not required to by law, as a sign of solidarity with women and to demonstrate the frivolity of Springfield's sex-based regulation of nipples.

On September 14, 2015, and in direct response to the protests,[1] the Springfield City Council repealed its indecent exposure ordinance and replaced it with a new law to reinforce and augment sex-based distinctions. The new ordinance restricts women—and only women—from publicly showing any portion of their breasts below the top of the areola when such a showing is "likely to cause affront or alarm." The new ordinance includes exceptions for female breast exposure if it is "necessarily incident to breast-feeding an infant" or for the purpose of "adult entertainment." The new ordinance also eliminates its predecessor's restriction on covered male genitalia such that men are now permitted to show their "covered genitals in a discernibly turgid state."

Springfield's new ordinance violates the First Amendment as a content-based restriction on protected expression. It also violates the Fourteenth Amendment Due Process Clause because it does not give fair warning about what conduct is criminal. In the accompanying motion, Plaintiffs request that the court enjoin enforcement of the new ordinance for the pendency of this case. Plaintiffs are organizing a street cleanup and have another rally planned for March 5, 2016. They wish to participate in those events and invite others to do so as well. They have been chilled, in violation of the First Amendment, from engaging in the expressive conduct uniquely suited to convey their message about systemic and invidious gender inequality.

[1] *See, e.g.*, September 14, 2015 Minutes, Springfield City Council, *available at* http://www.springfieldmo.gov/AgendaCenter/ViewFile/Minutes/09142015-879 (the "Minutes") (summarizing comments from Council Member Justin Burnett that the "rallies ha[d] revealed a 'weak' and 'ineffective' ordinance regarding indecent exposure" and explaining that his impetus for introducing the bill was to prevent a scheduled protest from taking place).

I. Background

On August 7, 2015, approximately seventy individuals[2] protested on the public square as part of Plaintiffs' "Free the Nipple" rally. Under what was then Springfield law, women were required to cover their nipples with an opaque covering. Female protestors complied with the law. Male protestors also taped their nipples to show solidarity and to emphasize the frivolity of Springfield's law. The purpose of the Free the Nipple rally was to promote gender equality, empower women, and protest sex-based double standards about breasts and the criminalization of the female body. Plaintiffs organized the rally. Plaintiffs organized and participated in a second rally on August 23, 2015, also at Park Central Square in downtown Springfield.[3]

On September 14, 2015, Defendant City of Springfield repealed and replaced its "indecent exposure" ordinance.[4] At that day's meeting,[5] the City Council made repeated reference to Plaintiffs' protests. *See* September 14, 2015 Minutes, Springfield City Council, *available at* http://www.springfieldmo.gov/AgendaCenter/ViewFile/Minutes/09142015-879 (the "Minutes").

Before the September 14, 2015 version, the ordinance had prohibited "the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state." Springfield, Mo., City Code § 78-222 (amended 2015). The new version removes the restriction on "covered male genitals." Springfield, Mo., City Code § 78-222 (Sept. 14, 2015) ("New Ordinance"). It also replaces the

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[2] *See* Jackie Rehwald & Trevor Mitchell, *Nearly 70 Participate in Free the Nipple Rally*, Springfield News-Leader, Aug. 8, 2015, *available at* http://www.news-leader.com/story/news/local/ozarks/2015/08/07/nearly-participate-free-nipple-rally/31327057/.

[3] *See* Declarations of Jessica Lawson and Amber Hutchison, attached as Exhibits A and B.

[4] The old and new versions of the ordinance are attached to these suggestions in support as Exhibits C and D.

[5] The entire Sept. 14, 2015 City Council meeting is viewable at https://vimeo.com/139292880.

nipple-coverage rule with a prohibition on showing, in a place open to public view, any portion of "the female breast below a point immediately above the top of the areola, for the purpose of sexual arousal or gratification or which is likely to cause affront or alarm." Code § 78-222(b)(1).

The New Ordinance exempts from criminalization "any exposure of the female breast necessarily incident to breast-feeding an infant." *Id.* By its terms, the New Ordinance requires breastfeeding mothers to cover every portion of the breast that is not "necessarily incident to breast-feeding," *id.*, despite Missouri's clear policy that public breastfeeding shall never be "considered an act of . . . indecent exposure . . . or any other similar term for purposes of state or municipal law." Mo. Rev. Stat. § 191.918 (2015). The New Ordinance also explicitly creates a safe harbor for "performances of adult entertainment" as defined elsewhere in Defendant's Code. § 78-222(c).

II. Argument

A. Standard for Preliminary injunction

In considering whether to issue a preliminary injunction, this Court must consider: (1) whether Plaintiffs have a fair chance of prevailing on the merits, (2) whether Plaintiffs face a threat of irreparable harm absent the injunction, (3) the balance between this harm and the injury that the injunction's issuance would inflict upon Defendant, and (4) the public interest. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). "When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2011) (en banc) (internal quotation marks omitted). Accordingly, when plaintiffs are "likely to win on the merits of [their] First Amendment claim, a preliminary injunction is proper." *Id.* at 877.

B. Plaintiffs are likely to succeed on the merits.[6]

1. The New Ordinance is a content-based restriction on Plaintiffs' protected expression and is therefore subject to strict scrutiny.

Plaintiffs' protest is expressive conduct: Plaintiffs' expressive conduct is protected because Plaintiffs intend to convey a particularized message that is likely to be understood by those who view it. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*, 418 U.S. 405 (1974)); *see also Tagami v. City of Chicago*, 2015 WL 4187209, at *1-2 (N.D. Ill. July 10, 2015) (finding that topless protester at "GoTopless Day" event had "engaged in expressive conduct protected by the First Amendment"); *Hightower v. City & County of San Francisco*, 77 F. Supp. 3d 867, 878 (N.D. Cal. 2014) (finding that nude protesters at city hall expressing "pro-body" and anti-public-indecency-ordinance messages engaged in protected expression).

Plaintiffs choose this particular expressive conduct in order to convey their message against systemic, invidious gender discrimination and the censorship of the female body. Plaintiffs' actions have significant expressive meaning, especially in the context of "Free the Nipple" rallies and similar demonstrations. *See Spence*, 418 U.S. at 410 ("[T]he context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol."); *Tagami*, 2015 WL 4187209, at *2.

The fact that Plaintiffs' conduct might be offensive to some does not make it any less expressive or protected. *See Spence*, 418 U.S. at 412 (noting that expression may not be prohibited merely "to protect the sensibilities of passersby"); *see also Johnson*, 491 U.S. at 414

[6] Plaintiffs are likely to succeed on the merits of each of their claims in this case. Although Plaintiffs discuss their likelihood of success on both their free speech and due process claims, they are also likely to succeed on their equal protection claim as well as their claim that the ordinance impermissibly conflicts with state law.

("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Plaintiffs' expressive conduct takes place in a traditional public forum: The New Ordinance restricts Plaintiffs' constitutionally protected expression in all places "open to public view," § 78-222(a), necessarily including public fora, which garner special protection under the First Amendment. "It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks my rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). Accordingly, "the government's ability to restrict expression in such locations is very limited." *McCullen*, 134 S. Ct. at 2529 (internal quotation omitted). This is especially true for content-based restrictions. *Id.* (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)) ("In particular, the guiding First Amendment principle that the 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content' applies with full force in a traditional public forum.").

Plaintiffs' August protests took place in Park Central Square in downtown Springfield. A town square is a traditional public forum to which the highest level of First Amendment protection attaches. *See Forbes v. Ark. Educ. Television Commc'n Network Found.*, 22 F.3d 1423, 1429 (8th Cir. 1994) (naming a "town square" as a paradigmatic example of a traditional public forum "devoted to assembly and debate") (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

The ordinance is content-based: The New Ordinance is a content-based restriction of expression. Although the Supreme Court has long held that content-based restrictions elicit strict scrutiny, *see, e.g.*, *Carey v. Brown*, 447 U.S. 455 (1980), lower courts diverged on the meaning of "content-based" until *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).[7] *Reed* clarified that a restriction is content based simply if it draws distinctions "based on the message a speaker conveys." 135 S. Ct. at 2227. *Reed* is clear that even "subtle" distinctions that define regulated expression "by its function or purpose . . . are distinctions based on the message a speaker conveys, and therefore, are subject to strict scrutiny." *Id.* This accords with *Johnson*, which held that "the emotive impact of speech on its audience is not a secondary effect unrelated to the content of the expression itself." 491 U.S. at 412 (internal quotations omitted).

The New Ordinance is content based in four different ways.

First, it is a content-based restriction on expression because it explicitly criminalizes only some instances of toplessness but not others, based on each instance's "function or purpose." *Reed*, 135 S. Ct. at 2227. Namely, the New Ordinance prohibits exposure of a female breast "for the purpose of sexual arousal or gratification or which is likely to cause affront or alarm." § 78-222(b)(1). From the New Ordinance's plain language, as long as it would not likely[8] cause affront or alarm, a woman could not be prosecuted for exposing her breast with the purpose of causing, e.g., non-sexual amusement. Furthermore, the New Ordinance expressly permits the exposure of female breasts as long as it is for the purpose of "adult entertainment." *Id.* The law is therefore content based because a police officer would have to determine the purpose the

[7] *Reed* involved a municipal "sign code" that regulated signs differently based on the kind of message they conveyed (such as "ideological," "political," or "temporary directional"). 135 S. Ct. at 2224-25. The Court rejected the city's argument that a law had to discriminate against certain viewpoints in order to be a content-based restriction. *Id.* at 2229.

[8] This language is unconstitutionally vague and overbroad, as discussed *infra*, part 4.

expressive conduct served before deciding whether there was probable cause a woman was violating the law. *See Reed*, 135 S. Ct. at 2227 (where a law draws a distinction "on its fact" by "defining regulated speech by its function or purpose," it is content based).

Second, Springfield has not only criminalized Plaintiffs' expressive conduct *solely because* of "the sensibilities of passersby," *Spence*, 418 U.S. at 412, but also has subjugated Plaintiffs' expressive conduct *to* those sensibilities—that is, the expressive conduct is prohibited *only if* it is likely to cause "affront" or "alarm." A law that criminalizes one person's speech based on another person's reaction is the very definition of content based. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (holding that a law "would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience'") (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ([l]isteners' reaction to speech is not a content-neutral basis for regulation"); *Johnson*, 491 U.S. at 412 (holding that this principle applies to expressive conduct; a statute regulating flag desecration was content based because it punished the expressive conduct based on "the emotive impact of [the] speech on its audience"); *see also Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 791 (8th Cir. 2015) (finding a law "content based" when it banned expression if it could be considered "profane . . . rude or indecent").

Third, the New Ordinance law criminalizes expressive conduct only from certain speakers: women and girls. Even if it did not distinguish between protected and prohibited speech because of its function or purpose, the New Ordinance would be content-based because it privileges certain speakers over others. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622,

658 (1994); *see also Reed*, 135 S. Ct. at 2231 (noting that speaker-based laws are not necessarily content neutral).

Fourth, even if the New Ordinance were facially content neutral, it would still be "considered content-based" because it was "adopted by the government because of disagreement with the message [the speech] conveys." *Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The New Ordinance was enacted solely because of the Plaintiffs' August protests against invidious gender discrimination and was aimed explicitly against chilling future protests.

These distinctions make the New Ordinance a facially content-based restriction on expression that must elicit "the most exacting scrutiny." *Johnson*, 491 U.S. at 412; *Reed*, 135 S. Ct. at 2227.

2. The New Ordinance fails under strict scrutiny because it is not narrowly tailored to serve any compelling government interest.

As a facially content-based restriction of expression in traditional public fora, the New Ordinance is presumptively unconstitutional unless Defendant "prove[s] that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 St. Ct. at 2231; *accord Johnson*, 491 U.S. at 412.

The New Ordinance does not contain a provision that describes its purposes or the government's interests. The Springfield City Council's minutes from September 14, 2015 reveal that Defendant considered three possible interests when enacting the New Ordinance: morality, revenue, and anti-exploitation. Minutes, *supra* note 1, at 5-8. None can justify the New Ordinance's infringements on First Amendment rights.

Defendant's purported interest in morality: First, Defendant's interest in morality is not compelling. Every councilmember who spoke about the New Ordinance articulated a morality purpose in some way. Minutes at 5-8 (referencing, *e.g.*, "conservative community with high social and moral ideals," "our way of life," and "family-friendly" image). Most also openly disparaged Plaintiffs' expressive activities. Minutes at 5-8. Moral disapproval is not a compelling interest under the First Amendment. *See, e.g.*, *Spence*, 418 U.S. at 412 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Johnson*, 491 U.S. at 414 (holding that, as a "bedrock principle," the First Amendment prohibits censorship of expression based on its "offensive or disagreeable" nature).

Furthermore, the New Ordinance is not narrowly tailored to serve Defendant's interest in preserving morality. The New Ordinance is underinclusive in at least three ways. *First*, the New Ordinance explicitly provides a safe harbor for "performances of adult entertainment," § 78-222(c), which undercuts Defendant's purported interest in preserving a "conservative" or "family-friendly" community. As such, Springfield protects a woman's right to show her breasts in a place open to public view, as long as the purpose is to sexually gratify a paying man, but prohibits her from engaging in the same conduct as part of a protest or for the purpose of expressing milk. *Second*, the New Ordinance removed the restriction on showing "covered male genitals in a discernibly turgid state" in public. § 78-222 (amended 2015). At least one councilmember even noted that this aspect of the New Ordinance is counterproductive to public morality. Minutes at 7. *Third*, the New Ordinance does not prevent the public display of male

breasts that may look and act the same as female breasts, which must be covered.[9] These provisions do not comport with the city's purported interest in maintaining a "family-friendly" community, as it appears to define that therm.

The New Ordinance is also overinclusive because it bans more conduct than necessary to promote even the council members' view of morality. For instance, the New Ordinance imposes more restrictions on breastfeeding than Missouri state law. *Compare* § 78-222(b)(1) *with* Mo. Rev. Stat. § 191.918. Thus, not only does Defendant's "morality" justification fall short of being a compelling government interest, but the New Ordinance is also not narrowly tailored to that interest.

Defendant's purported interest in revenue: In addition, the New Ordinance is not narrowly tailored to advance Defendant's interest in protecting "local revenue" related to its "family-friendly" image. Minutes at 6. Even assuming (without conceding) that this is a compelling government interest, the New Ordinance is not narrowly tailored to its advancement. Defendant's local-revenue concern is derivative of its interest in maintaining a moral, "family-friendly" image. Therefore, the New Ordinance is not narrowly tailored to Defendant's financial interests for the same reasons that it lacks narrow tailoring to Defendant's morality interests. The New Ordinance is underinclusive because the safe harbor for adult entertainment, the removal of the restriction on covered male genitals, and the permissive exposure of male breasts all undermine Defendant's purported financial interests in holding itself out as a family-friendly city. The New Ordinance is also overinclusive because its stricter regulations on breastfeeding make it less family friendly, undermining Defendant's interests in promoting local revenue. Additionally, Plaintiffs' expressive activities may even be increasing local revenue, as

[9] Medical consensus shows that male and female breasts are identical in appearance and function until puberty, and even after puberty, there are instances of male breasts appearing and functioning like female breasts, some being capable of lactation. The New Ordinance is underinclusive because it does not address these situations.

councilmembers noted that the rallies brought people into Springfield from surrounding areas. Minutes at 5, 7. Accordingly, the New Ordinance is not narrowly tailored to Defendant's local-revenue interests.

Defendant's purported interest in avoiding exploitation: Finally, the New Ordinance is not narrowly tailored to Defendant's interest in protecting women and children from exploitation. Minutes at 6. Even assuming this a compelling government interest, the New Ordinance is not narrowly tailored to achieving it. The New Ordinance is underinclusive because its exemption for "performances of adult entertainment" undermines an interest in avoiding the exploitation of women. The New Ordinance is also underinclusive to the extent that it fails to prevent the potential exploitation of young males, who are not required to conceal their breasts. The New Ordinance is overinclusive because it chills expression (such as Plaintiffs' demonstrations) *against* the exploitation and sexualization of women's bodies. Consequently, the New Ordinance undermines Defendant's interest in preventing the exploitation of women and children. All in all, Defendant cannot show that the New Ordinance is narrowly tailored to any compelling government interest. For this reason, Plaintiffs are likely to succeed on the merits of their First Amendment claim.

3. The New Ordinance fails even under the more deferential *O'Brien* test.

Even if the New Ordinance were to trigger the test for content-neutral restrictions of expression under *United States v. O'Brien*, 391 U.S. 367 (1968), the New Ordinance is still unconstitutional. *See Foxxxy Ladyz Adult World, Inc. v. Vill. of Dix*, 779 F.3d 706, 711 (7th Cir. 2015) (applying *O'Brien* to "municipality-wide regulations of public nudity"). Under *O'Brien*, a content-neutral restriction of expression is constitutional only if: (1) the restriction "is within the constitutional power of the Government," (2) the restriction "furthers an important or substantial

governmental interest," (3) "the governmental interest is unrelated to the suppression of free expression," and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. While Plaintiffs do not contest Defendant's constitutional authority to enact an indecent exposure ordinance, the New Ordinance fails under three of the four *O'Brien* factors.

First, the New Ordinance does not "further[] an important or substantial governmental interest." *Id.* Defendant's interest in morality is not "important or substantial" because the First Amendment does not deny protection for morally offensive expression. *See, e.g.*, *Johnson*, 491 U.S. at 414; *Spence*, 418 U.S. at 412; *Street*, 394 U.S. at 592. Even assuming (without conceding) that Defendant's other interests are important or substantial, the New Ordinance still fails under this *O'Brien* factor. This is because Defendant cannot "produce some specific, tangible evidence establishing a link between the regulated activity and harmful secondary effects." *Tagami*, 2015 WL 4187209, at *3 (finding that defendant City of Chicago failed to defend its content-neutral public nudity law under *O'Brien*). The New Ordinance undermines Defendant's interests because of the safe harbor for adult entertainment, the removal of the restriction on male genitals, and the permissive exposure of male breasts.

Second, defendant's justification is directly and impermissibly related to the suppression of free expression. *See Spence*, 418 U.S. at 406 ("The government . . . may not . . . proscribe particular conduct *because* it has expressive elements."); *see also Johnson*, 491 U.S. at 407 (finding that Texas' anti-flag-burning statute was related to the suppression of expression). The New Ordinance is a direct reaction to Plaintiffs' expressive activity. Nearly every councilmember who spoke about the New Ordinance decried Plaintiffs' expressive conduct. *See* Minutes at 5-8. One councilmember even gave his support for the New Ordinance because it

would deter additional expression. Minutes at 7 (noting that "there is another event planned, the Slut Walk, and he believes the proposed would help to make sure that event does not occur."). Accordingly, the New Ordinance fails under *O'Brien* because Defendant cannot claim that the New Ordinance is unrelated to the suppression of free expression.

Third, the restriction on Plaintiffs' First Amendment freedoms is greater than necessary to further Defendant's interests. For the same reasons described above, the New Ordinance is not narrowly tailored to Defendant's interests. Defendant could advance its interests with less restrictive means, such as through an educational initiative, or simply by warning citizens about Plaintiffs' protests. *See, e.g.*, *Spence*, 418 U.S. at 412 ("[A]ppellant did not impose his ideas upon a captive audience. Anyone who might have been offended could easily have avoided the display."). In sum, the New Ordinance fails three of the four *O'Brien* factors, and failing even one makes the New Ordinance unconstitutional. 391 U.S. at 376-77. Accordingly, even if the New Ordinance is viewed as a content-neutral restriction, it fails scrutiny under *O'Brien*.

4. The New Ordinance undermines due process because it does not provide fair warning as to what conduct will amount to a violation.

In addition to violating the First Amendment, the New Ordinance also violates the Fourteenth Amendment's Due Process Clause. Under the New Ordinance's plain language, an individual can be found in violation if their conduct has "the purpose of sexual arousal or gratification *or*" if it "is likely to cause affront or alarm." § 78-222 (emphasis added). On its face, the New Ordinance provides for two possible avenues for prosecution: acting with specific intent "for the purpose of sexual arousal or gratification," or making certain third-party reactions "likely." § 78-222.

The "likely to cause affront or alarm" provision "offends the Due Process Clause because it fails to provide fair notice of what is forbidden." *Stahl v. City of St. Louis*, 687 F.3d 1038, 1041 (8th Cir. 2012). In *Stahl*, the Eighth Circuit invalidated an ordinance that "criminalized speech if it has the consequence of obstructing traffic" because "the speaker does not know if his or her speech is criminal until after such an obstruction occurs." *Id.* Similarly, the New Ordinance's "likely to cause" provision makes a violation contingent upon a third party's likely reaction, which the actor will often not know. Because the "likely to cause" provision also lacks any mens rea requirement, an individual cannot control when their conduct will violate the New Ordinance. *Id.* (citing *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999)) (overturning the ordinance because "violation of the ordinance does not hinge on the state of mind of the potential violator, but the reaction of third parties"). Accordingly, although the New Ordinance does not require that a third party actually experience affront or alarm, the "likely to cause" provision nevertheless removes an individual's control over whether their conduct will amount to a violation. *See Stahl*, 687 F.3d at 1041. It also gives law enforcement officers unbridled discretion to determine what constitutes a violation. *See Morales*, 527 U.S. at 63-64 (striking down an ordinance for violating due process when it gave officers absolute discretion to determine whether conduct amounted to a violation); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 167-69 (1972) (invalidating vagrancy laws not only because they failed to provide fair notice of prohibited conduct but also because they gave police "unfettered discretion").

The Missouri Supreme Court has already struck down, as violative of due process, a similar Missouri state law that criminalized an individual's conduct based on whether a third party could guess if it was likely to cause "affront" or "alarm." In *State v. Beine*, 162 S.W.3d 483 (Mo. banc 2005), a school counselor urinated in a school restroom and thereby exposed his

genitals to boys also using the facilities. He was convicted of sexual misconduct, which criminalized such exposure if it was done "in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child. . . ." *Id.* at 484-85. Reversing the conviction, the Court found the law "patently unconstitutional." *Id.* at 486. Because the statute "prohibit[ed] conduct a person has no right to engage in and conduct a person has a right to engage in," it was unconstitutionally overbroad. *Id.* (the law could not stand where it was "completely lacking in any explicit requirement of a mental state"). *Cf. State v. Moore*, 90 S.W.3d 64, 67-69 (Mo. banc 2002) (upholding "affront or alarm" language only when it is coupled with defendant's prerequisite *knowledge* that certain conduct will cause it).

This quality of the New Ordinance is especially problematic because it restricts First-Amendment-protected expression. *Stahl*, 687 F.3d at 1041 ("The fact that a person only violates the ordinance if his or her action evokes a particular response from a third party is especially problematic because of the ordinance's resulting chilling effect on core First Amendment speech."); *see also FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("When speech is involved, rigorous adherence to those [due process] requirements is necessary to ensure that ambiguity does not chill protected speech."). Therefore, the New Ordinance is unconstitutional because it "criminalizes activity based primarily on often unpredictable reactions of third parties rather than directly on a person's own actions, and it excessively chilled protected First Amedment activity." *Stahl*, 687 F.3d at 1041. Plaintiffs are likely to succeed on the merits of their constitutional claims.

C. Plaintiffs satisfy the remaining *Dataphase* factors.

Plaintiffs' likelihood of success on the merits of their First Amendment and due process claims is enough to grant the preliminary injunction. *Minnesota Citizens Concerned for Life,*

Inc., 692 F.3d 864 at 877. Nevertheless, Plaintiffs also satisfy the remaining factors in favor of granting a preliminary injunction. *See Dataphase Systems, Inc.*, 640 F.2d at 114.

Plaintiffs meet the second factor, "irreparable harm," because they have already been injured by the chilling effect on their expressive conduct. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Absent an injunction, Plaintiffs would face citation, arrest, and prosecution under the New Ordinance for continuing their expressive activities. The New Ordinance's due process problems add even more uncertainty. Because Plaintiffs have established that they are likely to succeed on the merits, they have also established irreparable harm as the result of the deprivation of their First Amendment rights. *See, e.g.*, *Marcus v. Iowa Pub. Television*, 97 F.3d 1137, 1140-41 (8th Cir. 1996).

Plaintiffs meet the third factor because Plaintiffs' injury outweighs any potential harm to Defendant. "The balance of equities . . . generally favors the constitutionally-protected freedom of expression." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012). There is no harm to Defendant, which has no significant interest in enforcing the New Ordinance because it is likely unconstitutional.

Plaintiffs meet the fourth factor, showing that a preliminary injunction is in the public interest. "[I]t is always in the public interest to protect constitutional rights." *Phelps-Roper*, 545 F.3d at 689. Preventing the New Ordinance's likely unconstitutional enforcement while this case is pending serves the public interest.

D. Bond

The Court "may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). In similar cases, bond has been set at $100. *See Elli v. City of Ellisville*, 997 F. Supp. 2d 980, 984 (E.D. Mo. 2014); *Abdullah v. County of St. Louis*, 52 F. Supp. 3d 936, 948 (E.D. Mo. 2014); *Traditionalist Am. KKK v. City of Desloge*, 983 F. Supp. 2d 1137, 1151 (E.D. Mo. 2013). Plaintiffs respectfully request that bond be set at $100.

Respectfully submitted,

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Certificate of Service

I certify a copy of the foregoing was served upon Defendant by placing a copy of the same in the First Class mail addressed as set forth on October 27, 2015:

City of Springfield, Missouri
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City Attorney
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/s/ Anthony E. Rothert

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

FREE THE NIPPLE – SPRINGFIELD RESIDENTS PROMOTING EQUALITY, JESSICA LAWSON, and AMBER HUTCHISON	)	
Plaintiffs,	)	
vs.	)	Case No. 6:15-CV-3467
CITY OF SPRINGFIELD, MISSOURI,	)	
Defendant.	)	

DECLARATION OF JESSICA LAWSON

I, Jessica Lawson, declare as follows:

1. I am a plaintiff in the above-entitled action. I am over the age of 18. I offer this declaration in support of my motion for a preliminary injunction. I have personal knowledge of the facts set forth in this declaration and could and would testify competently to those facts if called as a witness.

2. I am a citizen of Missouri who resides in Springfield.

3. I helped organize a "Free the Nipple" rally on August 7, 2015, at Park Central Square in downtown Springfield, Missouri.

4. I also helped organize a "Free the Nipple" rally on August 23, 2015, at Park Central Square in downtown Springfield, Missouri.

5. I appeared at the August 23 rally without a shirt on but with my nipples covered with fully opaque tape in compliance with what was then Springfield law.

6. Showing my mostly nude upper body as part of my protest was, and continues to be, essential to the particular message I wanted to convey.

7. My expressive conduct on August 23 was in compliance with Springfield City Code § 78-222 and every other pertinent law known to me.

8. The message I was conveying, and that I want to continue to convey, is that as a woman, I am subject to invidious sex discrimination. The discrimination present in the law preserves sex stereotypes, exemplifies sex-based double standards, subjects me to inferior legal status, criminalizes my expressive conduct based solely on my sex, and perpetuates the hyper-sexualization of women, girls, and the female body. I think this is morally wrong, makes bad policy, and disempowers women and girls.

9. To the best of my knowledge, on September 14, 2015, the Springfield City Council passed a bill repealing and replacing Code § 78-222 with a new version. Among other things, that new version makes it a criminal offense for me to show any part of my breast below the top of my areola if it "is likely to cause affront or alarm."

10. I wish to express myself in the same way as I did on August 23—by showing my mostly nude upper body—to continue to educate others about subtle, state-sanctioned gender inequality.

11. As part of the unincorporated association Free the Nipple, Springfield Residents Against Inequality, I have planned specific upcoming protests that have now been put in limbo. I wish to publicize our cause and our protests. I wish to participate in a street cleanup we are planning. I also wish to participate in another protest scheduled for March 5, 2016.

12. Because of Springfield's new Code § 77-222, I am concerned about participating in this protest or engaging in my chosen expressive conduct because I reasonably fear arrest and prosecution.

13. Because of Springfield's new Code § 77-222, I have to choose between censoring myself or exposing myself to potential arrest, prosecution, and imprisonment.

14. I do not know how to tell if my expressive conduct is "likely to cause affront or alarm."

15. I have a child whom I breastfeed.

16. Because I am lactating, sometimes I breastfeed my child and sometimes I express milk.

17. Sometimes I breastfeed and express milk in a place "open to public view."

18. I do not know how to tell if the exposure of my breast when breastfeeding or expressing milk is "necessarily incident" to doing so.

19. My child is over one year old.

20. I declare under penalty of perjury that the foregoing is true and correct.

Dated this 26th day of October, 2015.

By: ___/s/ Jessica Lawson_____
Jessica Lawson

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

FREE THE NIPPLE – SPRINGFIELD RESIDENTS PROMOTING EQUALITY, JESSICA LAWSON, and AMBER HUTCHISON	)	
Plaintiffs,	)	
vs.	)	Case No. 6:15-CV-3467
CITY OF SPRINGFIELD, MISSOURI,	)	
Defendant.	)	

DECLARATION OF AMBER HUTCHISON

I, Jessica Lawson, declare as follows:

1. I am a plaintiff in the above-entitled action. I am over the age of 18. I offer this declaration in support of my motion for a preliminary injunction. I have personal knowledge of the facts set forth in this declaration and could and would testify competently to those facts if called as a witness.

2. I am a citizen of Missouri who resides in Springfield.

3. I helped organize a "Free the Nipple" rally on August 7, 2015, at Park Central Square in downtown Springfield, Missouri.

4. I also helped organize a "Free the Nipple" rally on August 23, 2015, at Park Central Square in downtown Springfield, Missouri.

5. I appeared at the August 7 and August 23 rallies without a shirt on but with my nipples covered with fully opaque tape in compliance with what was then Springfield law.

6. Showing my mostly nude upper body as part of my protest was, and continues to be, essential to the particular message I wanted to convey.

7. My expressive conduct on August 7 and August 23 was in compliance with Springfield City Code § 78-222 and every other pertinent law known to me.

8. The message I was conveying, and that I want to continue to convey, is that as a woman, I am subject to invidious sex discrimination. The discrimination present in the law preserves sex stereotypes, exemplifies sex-based double standards, subjects me to inferior legal status, criminalizes my expressive conduct based solely on my sex, and perpetuates the hyper-sexualization of women, girls, and the female body. I think this is morally wrong, makes bad policy, and disempowers women and girls.

9. To the best of my knowledge, on September 14, 2015, the Springfield City Council passed a bill repealing and replacing Code § 78-222 with a new version. Among other things, that new version makes it a criminal offense for me to show any part of my breast below the top of my areola if it "is likely to cause affront or alarm."

10. I wish to express myself in the same way as I did on August 7 and August 23—by showing my mostly nude upper body—to continue to educate others about subtle, state-sanctioned gender inequality.

11. As part of the unincorporated association Free the Nipple, Springfield Residents Against Inequality, I have planned specific upcoming protests that have now been put in limbo. I wish to publicize our cause and our protests. I wish to participate in a street cleanup we are planning. I also wish to participate in another protest scheduled for March 5, 2016.

12. Because of Springfield's new Code § 77-222, I am concerned about participating in this protest or engaging in my chosen expressive conduct because I reasonably fear arrest and prosecution.

13. Because of Springfield's new Code § 77-222, I have to choose between censoring myself or exposing myself to potential arrest, prosecution, and imprisonment.

14. I do not know how to tell if my expressive conduct is "likely to cause affront or alarm."

15. I have a child whom I breastfeed.

16. Because I am lactating, sometimes I breastfeed my child and sometimes I express milk.

17. Sometimes I breastfeed and express milk in a place "open to public view."

18. I do not know how to tell if the exposure of my breast when breastfeeding or expressing milk is "necessarily incident" to doing so.

19. My child is over two years old.

20. I declare under penalty of perjury that the foregoing is true and correct.

Dated this 27th day of October, 2015.

By: ___/s/ Amber Hutchison_____
Amber Hutchison

Sec. 78-222. - Indecent exposure.

(a) For purposes of this section, the term "nudity" means the showing of the human male or female genitals, or pubic area, or the middle third of the buttocks, measured vertically, with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

(b) No person shall appear in a place open to public view in a state of nudity.

(Code 1981, § 26-108)

State Law reference— Indecent exposure, RSMo 566.130.

One-rdg. _____
P. Hrngs. _____
Pgs. 3
Filed: 08-18-15

Sponsored by: Burnett

First Reading: _____ Second Reading: _____

COUNCIL BILL NO. 2015- 227 GENERAL ORDINANCE NO. _____

AN ORDINANCE

AMENDING the Springfield City Code, Chapter 78 – Offenses and Miscellaneous Provisions, Article V – Offenses Against Morals by repealing Section 78-222 – Indecent exposure in its entirety and enacting in lieu thereof a new Section 78-222 – Indecent exposure.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SPRINGFIELD, MISSOURI, as follows, that:

NOTE: Language to be added is underlined. Language to be deleted is ~~stricken~~

Section 1 – The Springfield City Code is hereby amended by repealing the existing Section 78-222 – Indecent exposure in its entirety and enacting a new Section 78-222 – Indecent exposure, which section shall read as follows:

Sec. 78-222. – Indecent exposure.

(a) No person shall engage in or commit any act of indecent exposure or conduct in place open to public view.

(b) "Indecent exposure or conduct" shall include:

(1) The exposure of one's genitals, buttocks, vulva, pubic hair, pubic area or the female breast below a point immediately above the top of the areola, for the purpose of sexual arousal or gratification or which is likely to cause affront or alarm; provided, however, that any exposure of the female breast necessarily incident to breast-feeding an infant shall not be deemed to be a violation of this chapter.

(c) Exception. This section shall not prohibit performances of adult entertainment in compliance with section 10-7.

~~Sec. 78-222. - Indecent exposure.~~

~~(a)~~

~~For purposes of this section, the term "nudity" means the showing of the human male or female genitals, or pubic area, or the middle third of the buttocks, measured vertically, with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.~~

~~(b)~~

~~No person shall appear in a place open to public view in a state of nudity~~.

Section 2 – This ordinance shall be in full force and effect from and after passage.

Passed at meeting: _____

_____
Mayor

Attest: _____, City Clerk

Filed as Ordinance: _____

Approved as to form: _____, City Attorney

Approved for Council action: _____, City Manager

EXPLANATION TO COUNCIL BILL NO. 2015-227

FILED: 08-18-15

ORIGINATING DEPARTMENT: Law Department

PURPOSE: To amend the Springfield City Code, Chapter 78 – Offenses and Miscellaneous Provisions, Article V – Offenses Against Morals by repealing the existing Section 78-222. – Indecent exposure and enacting a new section in lieu thereof.

BACKGROUND: Councilman Burnett has requested that the City's indecent exposure provisions be updated using the definition for female breast found in the Cape Girardeau, Missouri ordinance. The City of Springfield code section regulating indecent exposure presently prohibits showing of the female breast with less than a fully opaque covering of any part of the nipple. The proposed language will increase the area that is prohibited from exposure on both the female breast and the buttocks of either gender.

Submitted by:

Dan Wichmer, City Attorney

Approved by:

Greg Burris, City Manager